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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

Benoit Brookens,

Petitioner,

v.

Hilda L. Solis,
Secretary of Labor,

Respondent.

On Petition for a Writ of Certiorari
To the United Stated Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Benoit Brookens
460 Taylor Street, NE
Apt. G-44
Washington, DC 20017-4337
202/636-1695
Petitioner

QUESTION PRESENTED

Whether the U.S. Court of Appeals, denied the appellant the right to appeal pursuant to 28 U.S.C. 1291, when it summarily affirmed the decision of the district court, prior to its review, of any of the record in the trial court, or provide any consideration to any of the issues the appellant sought to raise on appeal?

This case presents the question whether a plaintiff, in a Title VII action under the Civil Rights Act of 1991, and Section 1981, is entitled to a trial, de novo, in the U.S. District Court and an opportunity for discovery?

Whether the circuit court's decision that Section 1981 of the Civil Rights Act, does not apply to federal employees is in error and conflicts with a holding of another federal circuit and the amended statute?

PARTIES TO THE PROCEEDING

Benoit Brookens, an international economist, at the U.S. Department of Labor with additional training in law, is the plaintiff in this Title VII action under the Civil Rights Act of 1991.

Hilda Solis, the successor to Elaine Chao as the Secretary of Labor, is the defendant.

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Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia.

Opinion and Judgment Below

The district Court's opinion is unofficially reported at _____, and reprinted in Appendix A-5. The court of Appeals unpublished order is unofficially reported at ___ and reprinted in Petitioner's Appendix, A-3.

Statement of Jurisdiction

The District Court has jurisdiction under 28 U.S.C. Art. 1331. The Court of Appeals issued its judgment on July 13, 2009. This Court has jurisdiction under 28 U.S.C. Art. 1254(1).

Statutory and Constitutional Provisions Involved

Relevant provision of Title VII of the Civil Rights Act of 1964, is provided in the Appendix at A-18.

Section 1981, as amended by the Civil Rights Act of 1991, is provided in the Appendix at A-18.

28 U.S.C. 1291provides for de novo judicial review in the U.S. Court of Appeals. The section is provided in the Appendix at A-19.

Statement of the Case

Benoit Brookens filed a civil action alleging intentional discrimination in the award of promotions in vacancies, promotions through desk audits, and details to training assignments leading to promotions. Mr. Brookens cited, comparator co-employee, (CR) who, was a GS-11 in 2001, and was promoted annually to GS-15, in 2006, while Mr. Brookens remained in Grade as a GS-12 since joining the U.S. Department of Labor in 1990.

Among Mr. Brookens' allegations, Amended Complaint, the Labor Department failed to properly evaluate his university level teaching [and other] experience, to qualify at the GS-14 level, as was the practice at other federal agencies. (Attachment 4, Appendix A-22).

In lieu of an Answer to the Complaint, DOL filed a motion to Dismiss and in the Alternative for Summary Judgment under FRCP 12(b)(6).

The district court, [decision, p.4, A-8], was not persuaded, under FRCP 12(b)(6), that "the case can be dismissed on timeliness grounds, failure to state a claim, or collateral estoppels."

The district court, however, rather that providing an opportunity for the defendant to file an Answer to the Complaint and provide the parties a period for discovery, the district court decided the agency's motion for summary judgment finding that

the plaintiff failed to "raise any genuine issues of fact," [district court decision, p.4,A-8].

Mr. Brookens filed an appeal, and prior to receipt of the record, the pleadings, or any documentary evidence, in the case, the court of appeals granted the Agency's motion to Summarily Affirm the decision of the District Court. A panel of the Court of Appeals ruled that "the merits of the parties' positions are so clear as to warrant summary action. (Decision, May 8, 2009) (Appendix, A-3).

The Court of Appeal, en banc, on July 13, 2009, affirmed. (Appendix, A-2)

The Record Below

The district court record, Docket Sheet (Appendix, A-22) shows that the record is devoid of any Answer to the Complaint, filed by DOL, or any discovery, authorized by the parties. The trial court, in its decision, states that the Plaintiff was denied "additional" discovery, when, in fact, the plaintiff nor the defendant, conducted any discovery in the proceeding.

The trial court cites and relies on the justifications the Agency provides to Mr. Brookens for denying him the requested personnel actions. Thoses "legitimate, non-discriminatory reasons" [Dist. Ct. decision, p. 5, A-9] are the very justifications Mr. Brookens is challenging de novo in the district count.

Plaintiffs are Entitled to a De Novo Review Under Title VII, (Civil Rights), and to Discovery in the District Court.

Parties, in Title VII actions of the Civil Rights act of 1964, are provided, by statute, a de novo hearing, in discrimination cases before the U.S. District Court. The Court of Appeals, upon petition, by either party, takes a de novo review of the district court's decision, 28 U.S.C 1291. Without the exercise of the proper oversight responsibility by the circuit court, the entire administrative review process for the enforcement of domestic civil rights and antidiscrimination laws and the American justice system, on this critical issue of our social policy, breaks-down[1].

The Circuit Court Failed its Oversight Responsibility to Support the Decision with Evidence from the Record or to Provide an Opportunity for Trial Court Discovery in All Circuits

The issues, identified in this petition, were presented to the court of appeals. However, that court's decisions, by the panel, nor en banc, identifies

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[1] Gaines v. Canada, 305 US 337, (S.C. Nov. 9, 1938), "A Quiet Hero of Civil Rights History, Vanished in 1939—NYTimes.com", "A Supreme Triumph, Then Into the Shadows," by David Stout, July 12, 2009, [www.nytimes.com/2009/07/09us/12gaines.html]" In 2006, Mr. Gaines was posthumously admitted to the University of Missouri Law School and the Missouri Bar. The U.S. Supreme Court granted review of the Missouri supreme court decision which held that Mr. Gaines failed to exhaust his administrative remedies.

or cites any of the arguments—or the evidence, in its decisions, for review by this court.

The review of those issues, thusly, is now requested before this court on certiorari.

The Court of Appeals, without a cursory examination of the record, as reflected in its decision, A-3, summarily affirmed the decision of the district court, A-5—without any regard to the issues the petitioner desired considered for review.

The district court, in general, recognizes the need for, and authority permitting the parties to conduct discovery in Title VII civil rights and discrimination actions. Generally, the evidence, documents, and witnesses, generally are in the hands of the defendant. That recognition was provided by the district court in this case.

"While summary judgment ordinarily 'is proper only after the plaintiff has been given adequate time for discovery," the district court wrote, [decision, p. 10] "*First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375,(1380)(D.C. Cir 1988) the information Brookens seeks through discovery is simply not necessary to decide this case."

Brookens provided to the district court, exhibit 4, [A-22] for example, an action by another federal agency, "The Executive Office of the President," certifying Mr. Brookens as eligible for a GS-14 vacancy, consistent with the relief requested in the complaint from DOL. This evidence-- in the trial court record-- was not reviewed nor considered by the

Court of Appeals. Although DOL provided witness statements contrary to the allegations by Mr. Brookens--in the Complaint--those statement were also contrary to the actions of other federal agencies on the same "delegate examination" applicant certification process which qualified Mr. Brookens for a similar vacancy.

The Court of Appeals—did not consider Mr. Brookens' formulation of this or any other of the issues Mr. Brookens raised in the appeal. Whether the appellant—is represented—or unrepresented—at any stage of the administrative or judicial process, the petitioner should be entitled to present to the appeals court his formulation of the factual and legal errors in any of the proceeding's below.

This was not permitted by the circuit court. That failure of the circuit court--and an error of due process—is now before this court in this petition.

The Supreme Court, has "discretionary" oversight responsibility for the circuit courts and, reportedly, will exercise that authority [2]based on a number of factors, including case load, national significance and impact upon the country, and perhaps, the proper application of the law and the efficient and fair operation of the judiciary.

However, the Circuit court has the "statutory and Constitution" oversight responsibility for the operation of the district courts and for providing oversight for the federal administrative agencies. In

[2] Applicable to approximately 7,000 annual certiorari filings.

this case, the Circuit court failed to properly exercise its required de novo review of Mr. Brookens' appeal.

The trial court summarily dismissed the plaintiff's "retaliation" claim,[decision, p. 10] when it found that "no jury could infer that Brookens' non-selection was retaliatory because Brookens has failed to rebut "the Secretary's legitimate non-discriminatory reasons for not selecting him for the position."

Without the requested discovery, Mr. Brookens clearly will be unable to produce other documents, as Exhibit 4, (App. ____) to refute those challenged explanations. The circuit has sanctioned this departure from the course of the accepted and usual proceedings in Title VII actions.

Mr. Brookens requests that this case be remanded to the circuit court for briefing on the merits of each of the issues of Mr. Brookens. Without Mr. Brookens' identification of the issues of the appeal, the circuit is failing to perform both its statutory and Constitutional, de novo, review responsibilities—in Title VII, Civil Rights Actions.

In First Chicago International, relied upon by the district court, we find an enunciation of the principals required of all U.S. courts:

> More fundamentally, under Federal Rules of Civil Procedure, when a Rule 12(b)(6) motion to dismiss is converted into a motion for summary judgment, all parties must be given a "reasonable opportunity all material made pertinent to such a motion by Rule 56.

Furthermore, it is settled that the term "reasonable opportunity" includes the opportunity to 'pursue reasonable discovery." See e.g. Celotex Corp. v. Catrett, 477 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 202(1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2514, 91 L.Ed.2d 202 (1986) (plaintiff must have "a full opportunity to conduct discovery");

The court of appeal deviated from the judicial norms established by this court when it accepted that denial of the plaintiff's right to discovery in this Title VII suit.

Amended Section 1981 Provides Enhanced Federal Employee Protections for "Intentional Discrimination."

Finally, the D.C. circuit decision, on the application of Section 1981, conflicts with the holding of another circuit on the applicability of Section 1981 to the Federal Government. The City of Milwaukee v. Saxbe, 546 F.2d 693, (1976), and amendments to the Civil Rights Act or 1991, 42 U.S.C. Art. 1991 provides enhanced protections to federal employees for "intentional discrimination" as Mr. Brookens alleges here.

For these reasons, the court is requested to grant certiorari for this petition.

Respectfully submitted,

Benoit Brookens
460 Taylor Street, NE
Apt. G-44
Washington, DC 20017-4337
202/636-1695

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(2)

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APPENDIX

No. _____

In The

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Benoit Brookens,

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v.

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Secretary of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
For the District of Columbia

No. 08-5527 September Term 2008
1:08-cv-00086-ESH
Filed on July 13, 2009

Benoit Otis Brookens, II,
Appellant

v.

Hilda L. Solis, Secretary,
U.S. Department of Labor,
Appellee

Before: Sentelle, Chief Judge, and Ginsberg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5527 September Term 2008

1:08-cv-00086-ESH
Filed On: May 8, 2009

Benoit Otis Brookens, II,)
Appellant
v.)
Hilda L. Solis,
Secretary,)
U.S. Department of Labor,
Appellee)

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has failed to demonstrate a genuine issue of material fact that the appellee's proffered reasons for not promoting him were pretextual or that he was denied the promotions because of discriminatory or retaliatory animus. See Brady v. Office of the Sergeant at Arms, U.S. House

of Representatives. 520 F.3d 490, 494 (D.C. Cir. 2008). The district court did not abuse its discretion in denying appellant's Fed. R. Civ. P. 56(f) request for discovery, because any information pertaining to his qualifications under the delegated examining authority would have been irrelevant, and the remainder of the request lacked the requisite specificity. See Messina v. Krakower. 439 F.3d 755, 762 (D.C. Cir. 2006) ("A party making a Rule 56(f) request must state concretely why additional discovery is needed to oppose a motion for summary judgment. We will not find an abuse of discretion where the requesting party has offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required.") (internal quotations and citations omitted). The district court properly dismissed appellant's 42 U.S.C. § 1981 claim with prejudice. See Hohri v. United States, 762 F.2d 227, 245 n.43 (D.C. Cir. 1986), vacated on other grounds. 482 U.S. 64 (1987) (stating that § 1981 does "not apply to actions against the United States").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en bane. See Fed. R. App. P. 41 (b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS,)
Plaintiff
v.) Civil Action No. 08-0086 ESH

ELAINE L. CHAO,)
Secretary, United States Department of Labor,)
Defendant

MEMORANDUM OPINION

Plaintiff Benoit Brookens has filed an amended complaint against Elaine Chao, in her official capacity as Secretary of the United States Department of Labor ("DOL"), alleging race and age discrimination and retaliation under Title VII, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.; and 42 U.S.C. §-1981.[1] According to plaintiffs

[1] Plaintiff has voluntarily withdrawn Count V of his amended complaint, which relies on 42 U.S.C. § 1981, so this count will be dismissed. (See Pl's Opp'n at 1 n.l.)

complaint, he was unlawfully denied three promotions in violation of Title VII and the ADEA (Counts I - III), and these denials also constituted retaliation for his exercise of protected activity (Count IV). Defendant has moved to dismiss the amended complaint, or in the alternative, for summary judgment. Plaintiff opposes this motion, claiming that he was exempt from the qualifications for these positions and from the requirement of prior experience at a level above a GS-12. As explained, more fully below, the Court concludes that plaintiff has failed to raise any material issues of fact regarding his non-promotion to these positions, and that no reasonable jury could conclude that race or age played any role in the agency's decision to find him unqualified for these positions.

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BACKGROUND

Brookens is an African-American male and is over forty years of age. (Amd. Compl. para. 7.) He obtained law and business graduate degrees from Columbia University, New York, NY. *(Id.* para. 8.) He has previously practiced law and taught as an adjunct professor at the University of Virginia, Falls Church, VA. *(Id.* para. 19.) Brookens has been employed by the DOL as an International Economist in the Bureau of International Labor Affairs ("ILAB") at grade GS-12 since 1990. *(Id.*

para. 10.) He claims that he has met or exceeded his employer's legitimate expectations. *(Id.* para. 11.)

In June 2005, Brookens expressed interest in a temporary promotion as the Acting Director of the Trade Policy Division in ILAB, a GS-15 position. *(Id.* para. 19.) He was neither considered nor selected for this position.[2] *(Id* para. 20-21,) As a result, Brookens filed an administrative complaint of discrimination in August 2005. *(Id.* para. 22.) Following an investigation by the DOL's Civil Rights Center ("CRC"), Brookens requested an EEOC hearing. The Administrative Judge ("AJ") found no discrimination and specifically found that Brookens, as a GS-12 employee, was not eligible for the temporary promotion because he did not have "at least one year of service at the prior grade level -in this case, a GS-14." *(See* Def.'s Ex: A, EEOC Case No. 570-2006-0012IX, at 17 (Dec. 7, 2006).) Brookens timely appealed. The EEOC Office of Federal Operations ("OFO") affirmed the AJ's decision. *See Brookens v. Chao,* EEOC Doc. 0120071829, 2007 WL 2161734 (July 17, 2007). Brookens also filed a motion for

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[2] The person chosen for the temporary position, Dobson, was 18 months older than plaintiff and was the "more senior" member of the eligible GS-14 employees who expressed an interest in the position." (Def.'s Ex. A, EEOC Case No. 570-2606-0012IX, at 15-16 (Dec. 7, 2006).)

reconsideration, which was denied. *See Brookens v. Chao,* EEOC Doc. 0520070890, 2007 WL 3051339 (Oct. 9, 2007).

In September 2006, Brookens submitted an application in response to a vacancy announcement for the Director of ILAB's Office of Trade and Labor Affairs, a Senior Executive Service ("SES") position. (Amd. Compl. paras. 24-25.) Brookens was neither considered nor selected for this position. *(Id.* para. 26.) A human Resources specialist informed Brookens that he was not eligible for the position because he lacked "significant senior level management experience." *(Id.)* Brookens consequently filed an administrative complaint, alleging race discrimination and retaliation. *(Id.* para. 27.) On March 14, 2008, the AJ dismissed Brookens' complaint with prejudice because Brookens sought relief in this civil action. *(See* Def.'s Ex. C, EEOC Case No. 570-2007-00778X (Mar. 14, 2008).)

In October 2006, Brookens submitted an application for a Deputy Director position in ILAB's Office of International Relations at both the GS-14 and GS-15 grade levels. (Amd. Compl. paras. 30-31.) Brookens was neither considered nor selected for this position. *(Id.* f 32.) He was told that he was not certified for the position because he lacked the time-in-grade requirement.[3] *(Id.; see also* Def.'s Ex. D, Witt Aff. at 3).

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[3] For the GS-14 position, plaintiff was one of eight who were not certified on the basis of a lack of qualifications,

As a result, Brookens filed an administrative complaint of discrimination. (Amd. Compl. para. 33.) Following a CRC investigation, Brookens requested an EEOC hearing. On March 14, 2008, the AJ dismissed Brookens' complaint with prejudice because Brookens sought relief in this civil action. (*See* Def.'s Ex. C, EEOC Case No. 570-2007-00778X (Mar. 14, 2008).)

[Page 4 of 11]

Plaintiff filed suit on January 16, 2008, and amended his complaint on July 8, 2008. While defendant raises several arguments to support dismissal under Rule 12(b)(6), the Court is not persuaded that the case can be dismissed on timeliness grounds, failure to state a claim or collateral estoppel. The Court concludes, however, that plaintiff has failed to raise any genuine issue of fact regarding his lack of qualifications for the positions which are at issue, and that no reasonable juror could find that defendant denied plaintiff any of these positions because of a discriminatory or retaliatory animus.

ANALYSIS

I. Title VII, ADEA

A. Legal Standards

To succeed on a claim of discrimination under Title VII and the ADEA, a plaintiff has the initial burden of establishing a prima facie case of

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and for the GS-15 position, plaintiff was one of eleven. (Def.'s Ex. D, Witt Aff. At 3.)

discrimination by showing that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); *see also McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004) (applying *McDonnell Douglas* framework to ADEA claims). A prima facie case of retaliation requires a plaintiff to show that "(1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the two." *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003); *see also* 42 U.S.C. § 2000e-3(a).

When reviewing a motion for summary judgment, a district court need not - and should not - evaluate a plaintiff's prima facie showing where a defendant sets forth a legitimate, non-discriminatory reason for its conduct. *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490,

494 (D.C. Cir. 2008). In the present case, the Secretary has consistently proffered a legitimate, non-discriminatory reason for not selecting Brookens for the positions described in Counts I - III. The Secretary asserts that Brookens was not assigned to the GS-15 level Acting Director of the Trade Policy Division temporary promotion (Count I) or the GS-14/15 level Deputy Director of the Office of International Relations position (Count III) because both positions required at

least one year experience at either a GS-13 or GS-14 level. *(See* Def.'s Stmt. Material Fact 1; Def.'s Ex. D, Witt Aff. at 3; Def.'s Ex. E, Broderick Decl. paras. [14-15) The Secretary further alleges that Brookens was not considered for the SES level Director of the Office of Trade and Labor Affairs position (Count II) because he lacked the necessary executive experience since he had only obtained a GS-12 level. *(See* Def.'s Stmt. Material Fact 2; Def.'s Ex. F, Holmes Decl. para. 15.)

Because the Secretary sets forth legitimate, non-discriminatory reasons for the agency's actions, the Court looks to whether Brookens has offered any evidence upon which a jury could infer that the Secretary's proffered nondiscriminatory reasons were not the true reasons for the employment decisions. *Morgan v. Fed. Home Loan Mortgage Corp.*, 328 F.3d 647, 651 (D.C. Cir. 2003). "At this stage, if [the plaintiff] is unable to adduce evidence that could allow a reasonable trier of fact to conclude that [the defendant's] proffered reason was a pretext for discrimination [or retaliation], summary judgment must be entered against [the plaintiff]." *Paquin v. Fed. Nat'l Mortgage Ass'n,* 119 F.3d 23, 27-28 (D.C. Cir. 1997).

Applying these standards, the Court will now turn its attention to the three positions which underlie Counts I - III.

B. Count I - GS-15 level Acting Director of the Trade Policy Division

Count I alleges that Brookens, a GS-12 International Economist, was subjected to discrimination based on his race and age when he was neither considered nor selected for a GS-15 level Acting Director of the Trade Policy Division position. (Amd. Compl. paras. 18-22.)

The Secretary has shown that the Acting Director position was a GS-15 temporary promotion with a time-in-grade requirement, meaning that an eligible employee had to possess 52 weeks of experience at the next lower grade level. *(See* Def.'s Stmt. Material Fact 1 (citing Def.'s Ex. D, Wiff. Aff; Def.'s Ex. E, Broadrick Decl.).) Brookens was a GS-12 employee, who had not performed work at either the GS-13 level or the GS-14 level for the requisite 52 weeks. The Secretary insists, therefore, that Brookens was not eligible for the GS-15 level Acting Director position. The AJ agreed and specifically found that the Acting Director position was a "temporary promotion," and that Brookens, as a GS-12 employee, was not eligible for the position because he did not have "at least one years of service at the prior grade level - in this case, a GS-14." *(See* Def.'s Ex. A, EEOC Case No. 570-2006-00121X, at 16-17, 20-22 (Dec. 7, 2006).)

Brookens does not dispute that he failed to satisfy the time-in-grade requirement. Rather,

he asserts that the time-in-grade requirement did not apply to him because the Acting Director position was a "detail" position lasting 120 days or less. (PL's Ex. 1, Brookens Decl. para. 2; PL's Ex. 2, Agreement Between Local 12, AFGE, AFL-CIO and DOL.) The difficulty with Brookens' position is that the unrebutted evidence regarding this position is that it was a "temporary promotion" and not a "detail," and, contrary to Brookens' suggestion in his

complaint,[4] these two types of positions are not interchangeable, for a temporary promotion involves a pay increase to the next grade level, whereas a detail does not. Therefore, in order to receive a temporary promotion, the employee needed a minimum of one year of experience in the next lowest grade level. (Def.'s Ex. A, EEOC Case No. 570-2006-0012IX, at 14 (Dec. 7, 2006).)

While plaintiff, as well as others, may well have been confused about the difference between a "detail" and a "temporary promotion" *(Id.* at 16-17),

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[4] *See, e.g.,* Amd. Compl. para. 19 (referring to Acting Director Position as a "detail and temporary position"), para. 20 ("detail and/or temporary promotion"), para. 21 ("detail and/or temporary promotion"). *(See also* Def.'s Ex. A, EEOC Case No. 570-2006-0012IX, at 13 (Dec. 7, 2006).)

there is no dispute that there is a difference between the two classifications and that since the Acting Director job was to be paid at the higher GS-15 level, plaintiff was not considered to be eligible because he had not had a year in service as a GS-14. *(Id.* at 17.) Therefore, there is nothing in the record to suggest that the reason for his non-selection was pretextual.

C. Count II - SES level Director of the Office of Trade and Labor Affairs

Count II alleges that Brookens was subjected to discrimination based on his race, age, or prior EEO activity when he was neither considered nor selected for the SES level Director of the Office of Trade and Labor Affairs position after he submitted an application in response to the vacancy announcement. (Amd. Compl. paras. 23-28.)

In response, defendant argues that Brookens lacked the qualifications for the position and was therefore "determined unqualified under vacancy announcement DOL-SES-06-021 because he did not possess significant senior level management experience. (Def.'s Stmt. Facts para. 2.) In making this argument, defendant relies on the declaration of the Human Resources Specialist who was responsible for filling this vacancy. As she explained, the vacancy announcement for

this position stated that the candidate must have experience "at a major management level (normally equivalent to the GS-15 level in the Federal Service)." (Def.'s Ex. F, Holmes Decl. para. 13.) Based on the qualifications listed in the vacancy announcement, Holmes determined that Brookens "was not minimally qualified for this SES position. Because Mr. Brookens had been a GS-12 employee since 1990, he had not achieved the executive experience needed for this SES position." *(Id* para.15.)

In response, plaintiff merely asserts that he was qualified for the position. *(See* Pl's Stmt. Material Fact para. 2.) He offers no evidence to support this assertion in violation of the well-settled rule that a plaintiff cannot establish pretext, simply based on his own subjective assessment of his own performance, for "plaintiffs perception of [himself, and of [his] work performance, is not relevant." *Waterhouse v. District of Columbia,* 124 F Supp. 2d 1, 7 (D.D.C. 2000) (internal citation omitted), *aff'd,* 298 F.3d 989 (D.C. Cir. 2002). *See also Hastie v. Henderson,* 121 F. Supp.2d 72, 81 (D.D.C. 2000) (finding no genuine issue of fact where plaintiff provided no evidence "other than her own self-serving and conclusory statement that she completed more work than [her co-worker]"); *Sounders v. DiMario,* No. Civ. A. 97-1002, 1998 WL 525798, at *4 (D.D.C. August 14, 1998) ("Plaintiff has otherwise offered the type of self-serving allegations that are simply insufficient to establish pretext.").

Count II must therefore be rejected since there is no showing of pretext.

D. Count III - GS-14 / GS-15 level Deputy Director of the Office of International Relations

Count III alleges Brookens was subjected to discrimination based on race, age, or prior EEO activity when he was neither considered nor selected for a GS-14 and GS-15 Deputy Director of the Office of International Relations position after he submitted an application. (Amd. Compl. para. 29-34.)

The Secretary contends that Brookens was not eligible for the Deputy Director position at either GS-14 or GS-15 because, as a GS-12 employee, Brookens failed to meet the time-in-grade requirement under the agency's merit staffing procedures. (Def.'s Mot. at 5; *see also* Def.'s Ex. D, Witt Aff.at 3.)

Once again, Brookens does not dispute that he failed to satisfy the time-in-grade requirement. Instead, he argues that the time-in-grade requirement did not apply to the Deputy Director job posting because the position was subject to the delegated examining authority process, which allows for consideration of candidates regardless of their time-in-grade experience. (*See* Pl.'s Stmt. Material Fact 1; Pl.'s Ex. 1, Brookens Decl.paras. 2-4; Pl.'s Ex. 3.)

There is no probative evidence, aside from Brookens' conclusory assertion,[5] that the Deputy Director position was subject to the delegated examining authority process, as opposed to the merit staffing process. Instead, the record clearly indicates that Brookens' application was subject to the merit staffing procedures. Joanne T. Broderick, the Human Resources Specialist who reviewed Brookens' application, described his application under the merit staffing procedures. She explained that Brookens "is no eligible for a promotion to GS-14 positions that are advertised under *merit staffing procedures* for DOL employees because Mr. Brookens does not possess the required 52 weeks in GS-13 position." (Def.'s Ex. E, Broderick Decl. para. 14 (emphasis added).) Broderick also stated that Brookens "is not eligible for a promotion to GS-15 positions that are advertised under *merit staffing procedures* for DOL employees because [he] does not possess the required 52 weeks in a GS-14 position." *(Id.* at para. 15 (emphasis added).) Broderick further concluded that Brookens was not eligible for an exclusion from the time-in-

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[5] In support of his assertion, Brookens refers the Court to an application he submitted under the delegated examining authority process. *(See* Pl.'s Ex. 4.) However, that application was for a Supervisory International Economist position (ILAB 07-068DE), not for the Deputy Director position (ILAB 07-010M), and is thus irrelevant to this case.

grade requirements under 5 C.F.R. § 300.603(b) (listing delegated examining authority process as grounds for exclusion from grade-in-time requirement). *(Id* at para 16.) Ericka Witt, another Human Resources Specialist, explained that "[b]ecause [the Deputy Director position] was a *merit promotion announcement,* [Brookens] would need to have worked for at least 52 weeks at the GS-13 grade level before he would be eligible for a GS-14 position." (Def.'s Ex. D, Wit Aff. at 3 (emphasis added).)

Based on this uncontroverted evidence, it must be concluded that the Deputy Director position was governed by the merit staffing process, and, consequently, Brookens' failure to meet the time-in-grade requirement made him ineligible for the position. Brookens has thus failed to show pretext with respect to Count III.[6]

E. Count IV-Retaliation

Because the Court grants summary judgment to defendant on Brookens' non-selection claims, it must also grant summary judgment

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[6] For these same reasons, plaintiff has no basis for asserting that the temporary position (Count I) was available under the delegated examining process. *(See* Pl's Ex. 1, Brookens Decl. para 2.)

on Count IV. No jury could infer that Brookens' non-selections were retaliatory because Brookens has failed to rebut the Secretary's legitimate, non-discriminatory reasons for not selecting him for the positions.

II. Rule 56(f) Request For Discovery

In his declaration, plaintiff requests the opportunity to conduct discovery because he "would need the assistance of expert witnesses, e.g. regarding his qualification and eligibility under the delegated examining authority ...." (PL's Ex. 1, Brookens Decl. para. 5.)

While summary judgment ordinarily "is proper only after the plaintiff has been given adequate time for discovery," *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988), the information Brookens seeks through discovery is simply not necessary to decide

this case. As discussed above, the record indicates that the Deputy Director position was subject to merit staffing procedures. Because Brookens has failed to show that the delegated examining authority procedures apply here, the Court concludes that Brookens' eligibility under those procedures would have no bearing on this case.

In addition, Brookens has failed to provide sufficient particularity to justify his request for discovery. *See Messina* v. *Krakower,* 439 F.3d J55, 762 (D.C. Cir. 2006) (party seeking a continuance must "state[] concretely why additional discovery is needed to oppose [the motion]") (internal quotation omitted); *Byrd v. EPA,* 174 F.3d 239, 248 n.8 (D.C. Cir. 1999) (party seeking discovery bears the burden of identifying the factors to be discovered that would create a triable issue and reasons why the party cannot acquire those facts without discovery to challenge a motion for summary judgment).

For these reasons, there is nothing to suggest that this vague request for discovery will help plaintiff to respond to defendant's summary judgment motion.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss, or in the alternative, for summary judgment is GRANTED. An Order accompanies this Memorandum Opinion.

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ELLEN SEGAL HUVELLE
United States District Judge

Date: October 21, 2008

Statutes

42 U.S.C.A. Art. 2000e-2(a) provides that

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensatin, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

41 U.S.C. 1981a "Section 1977A. Damages in Cases of Intentional Discrimination in Employment.

(a) Right of Recovery—
"(1) Civil Rights—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engages in unlawful intentional discrimination (not an employment practice because of disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and providing that the complaining party cannot recover compensatory and punitive damages as allowed under 1977 of the Revised Statutes (42 U.S.C. 1981), complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

TITLE 28 > PART IV > CHAPTER 83 > § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

Relevant Docket Sheet Entries

Civil Docket for case #1:08-cv-00086-ESH

Brookens v. Chao Date filed: 1/16/2008

Plaintiff	Represented by
Benoit Brookens	Boniface K. Cobbina, PC
Defendant	Represented by
Elaine Chao	Alan Burch
Secretary,	U.S. Attorney's Office

Date Filed	Item #	Docket Text
12/19/2008	13	Notice of Appeal by Benoit Brookens
10/21/2008	18	Memorandum Opinion Regarding 14 defendant's motion for summary judgment
10/21/2008	17	Order granting 14 defendant's motion For Summary Judgment filed by Elaine Chao

Date Filed	Item #	Docket Text
9/3/2008	16	Reply to opposition re 14 Motion to Dismiss Amended Complaint or in the alternative Motion for Summary Judgment filed by Elaine Chao.
7/25/08	14	Motion to Dismiss Amended Complaint or in the alternative, Motion for Summary
7/8/2008	11	Memorandum in opposition to re 5 Motion to Dismiss, or, in the alternative, Summary Judgment
7/8/09	10	Amended Complaint filed by Benoit Brookens with Attachments
5/22/2008	7	Notice of Appearance by Boniface K. Cobbina on behalf of Benoit Brookens
1/16/2008	1	Complaint against Elaine Chao

EVIDENTIARY DOCUMENT

[Plaintiff's Ex. 4.]

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Administration
Washington, DC 20503

[Seal]

CERTIFICATE OF ELIGIBLES
DELEGATED EXAMINING CERT:
USTR-04-62-VM

TO: Lorraine Green
Deputy, AUSTR for Admin
and HR Director

FROM: Vel McClure
Human Resources Specialist

POSITION: Policy Analyst (Labor)
GS-301-14/15
(FPL: GS-15)

DATE: 7/19/04

Candidates	Eligibility	Veterans Preference
Brookens, Benoit	GS-14	NV
Quintana, Carlos	GS-15	NV

Selectee: _____

Signature
of Selecting Official: _____

Name and Title
of Selecting Official:

_____

Date:

_____

[handwritten comment: "Posn cancelled by Lorraine Green on 12-7-04 Posn no longer required. D Hardesty"]